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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **CARLTON PAUL CLAY,** **Defendant and Appellant.**	**A122650** **(Sonoma County Super. Ct. No. SCR-461992)**

Carlton Paul Clay (Clay) appeals from an order executing sentence after the trial court found he had violated a probation condition precluding him from contact with minors. Clay contends: (1) the court violated his due process rights in relying upon the court probation officer's statements, after the close of evidence, concerning the probation condition; (2) the notice of probation violation did not provide adequate notice of the manner in which he was ultimately held to have violated his probation; (3) there was insufficient evidence of the probation condition he violated; (4) the probation condition was unconstitutionally overbroad; (5) the court erred in executing the prison sentence, because the evidence did not support the finding that he was a danger to the community; and (6) defense counsel provided ineffective assistance of counsel. We will affirm the order.

I. *FACTS AND PROCEDURAL HISTORY*

A. *2005 Conviction and Sentence*

In June 2005, Clay pled guilty to substantial sexual conduct with a child under the age of 14. (Pen. Code, § 288.5, subd. (a).) The victim was his four-year-old niece.

In August 2005, the court sentenced Clay to state prison for the midterm of 12 years, but stayed execution and placed him on probation for three years. The conditions of probation included that he serve a year in county jail and not initiate contact with minors. Specifically, the court informed Clay at the sentencing hearing: "You're not to initiate or make any contact with any minor under the age of 18 years unless the responsible adult who's been approved by probation is present and you have received prior approval of the probation officer for the contact with the minor." The court also instructed Clay: "You're to sign and abide by the probation department's definition of no contact."

A "Felony Probation/Conditional Sentence" order, dated August 12, 2005, contains the handwritten notation, "Do not initiate contact with minors." Clay's signature appears on the bottom of the page.

In addition, the record includes a document captioned, "CONDITIONS OF FORMAL (SUPERVISED) PROBATION SEX OFFENDER CASELOAD CONDITIONS," dated August 12, 2005, which Clay also signed. A checkmark appears next to conditions H72 and H72A: "H72 do not initiate, establish, or maintain contact with any minor, male or female, under the age of 18 years [¶] H72A unless in the presence of a responsible adult and with prior approval of the Probation Officer." A checkmark also appears next to condition H73, which provides, "*Sign and abide by* the Probation Department's 'Definition of NO CONTACT.'" (Italics added.) The record does not contain any indication that Clay failed to sign the probation department's document defining "no contact."

B. *Probation Violation*

On May 30, 2008, the probation department requested that Clay's probation be revoked. Based on information discovered in the investigation of a fire at Clay's

residence, the revocation request charged that Clay "[h]ad contact with a minor, his 12-year-old nephew Damien C[.] without the presence of a responsible adult and without the permission of his probation officer."

On June 3, 2008, the revocation request was granted and probation was summarily revoked. The matter proceeded to a probation violation hearing.

1. *Prosecution Case*

Clay's nephew, Damien C., was 12 years old at the time of his testimony. Damien testified that he lived at 84 Bellevue in Santa Rosa (until the house burned down) with his grandmother Nora, his uncle John, and Clay. Uncle John lived in the main house, which had a kitchen and bathroom. Damien and Nora slept in a water tower, while Clay slept in a shed that was about 15 feet from the water tower and 20-30 feet from the main house.

The water tower had no running water, kitchen, or bathroom, so Damien and Nora used the kitchen and bathroom in the main house. Clay used the kitchen and bathroom in the main house as well.

Damien testified that he did not spend much time with Clay in the main house. While Damien ate in the living room, Uncle John prepared Clay's food and took it to Clay in Clay's room, where Clay ate. Clay also played video games in Clay's room. Damien neither played video games with Clay nor ate with Clay.

Nonetheless, Damien saw Clay at 84 Bellevue "a lot of times" in the six months preceding his testimony, when Clay "would go out [of] his room . . ., come inside the house, [and] go to the bathroom." Although Damien did not talk with Clay "that much," Clay approached him "to see how was [he] doing at school and everything" "three times a week." Clay returned to his room after they talked. Damien was never alone with Clay, because his uncle John "was always there."

Damien acknowledged that he spent time away from 84 Bellevue to be with friends, but he denied telling his own probation officer that he left the premises to avoid Clay or that Clay was mean to him.

When Damien was recently in juvenile hall, Nora visited him and said he should lie and say that he lived at an address on Arrowwood, where his aunt Alicia lived.

Damien had stayed at that address only for two weeks. He acknowledged telling his probation officer that he did not want to live with Nora because he knew she would let Clay move in with them again.

Deputy Probation Officer (DPO) Lisa Rogers testified that she was Damien's probation officer. Damien told her that he lived with his grandmother (Nora), his uncle Clay — who was mean to him — and another uncle (John). Damien also told DPO Rogers that his grandmother visited him at juvenile hall and asked him to lie about where he lived. Damien said he did not want to live with his grandmother because she would allow Clay "to come live in the home whenever he's released from jail, and he's scared of [Clay]."

To avoid Clay, Damien "said he would avoid being home during the day and try and come back at, like, 8:00, 8:30 at night." He reported that Clay had been physical with him within the last three years, punching him, choking him, and pulling his hair. DPO Rogers also testified that Damien "reported a sexual molest two to three years ago by [Clay]."

The prosecutor asked the court to take "judicial notice of probation conditions in SCR46199." The court replied, "I'm told that I have them in front of me." Clay did not object.

Probation Assistant (PA) Kevin Gingher testified that he assisted Clay's probation officer, Tina Ornell, and was familiar with Clay's probation file. Chronological reports in the file, prepared at or near the time of the events listed in the reports and in the ordinary course of the probation officer's duties, did not indicate that the probation department had granted permission to any adult to supervise visits between Clay and Damien.

2. *Defense Case*

Clay's sister Alicia identified herself as Damien's aunt and the mother of the victim in the underlying case. She testified that Clay lived at 84 Bellevue with John, but that Damien never lived there and she never saw Damien there. Instead, Alicia claimed,

Damien and Nora lived at Alicia's home on Arrowwood Drive, with friends, or at Nora's overnight job caring for the elderly.

Clay's mother Nora testified that she was Damien's grandmother and legal guardian. According to Nora, Damien lived with her for all but six months of his life. Although Nora lived at 84 Bellevue before Clay was arrested, she moved out before he was released from custody. After Clay was released from custody, he lived at 84 Bellevue with John, but Nora and Damien did not. Rather, Nora and Damien spent most nights at the house of the elderly man she cared for, and the rest of the time they stayed with one of her daughters.

Nora testified that from January to May 23, 2008, Damien did not sleep at 84 Bellevue because "[w]e were trying to avoid having to go out to 84 Bellevue because it was a restriction for [Clay] that we could not live there." The previous year, Damien spent the night at 84 Bellevue several times but, on those occasions, "[Clay] never came into the house," although he was on the property. Nora had never seen Clay and Damien together at 84 Bellevue, although they might have been on the premises at the same time.

Clay's brother John testified that he lived at 84 Bellevue until the house burned down a month and a half before the probation revocation hearing. Clay lived there too, John asserted, but Damien did not. According to John, no one slept in the water tower. When Clay was released from custody, Nora and Damien moved out of 84 Bellevue and stayed either with his sister or where Nora worked. Although Damien visited 84 Bellevue, John made him leave when he found him there. John never saw Damien in Clay's presence at the main house, and Clay remained in his room except to shower and did not spend long periods of time in the house.

John acknowledged that he told the assistant fire chief, after the fire at 84 Bellevue, that Nora and Damien lived with him. John testified that his statement was a lie, which he told because he thought the Red Cross might not provide shelter if only he and Clay lived at the address. John acknowledged that it was Damien who discovered the fire at 84 Bellevue.

3. *Court's Observations*

After the parties had rested their cases, the court observed: "Let me say, my view of the state of the evidence is that Damien has been over there on occasion, and there has been at least casual contact between the two of them because [Clay] has to go into that house to use the bathroom and the kitchen." The court continued: "I'm not sure that that is a violation of initiating contact with a minor. He's in a situation where he's living with his family, he's living in an outbuilding, and there may have been some casual contact, but I don't think he was initiating contact with a minor."

The prosecutor expressed her view that Clay's conduct did constitute an initiation of contact with a minor, and further observed that the probation condition was that "he was not to initiate, establish, *or* maintain contact with any minor, male or female." (Italics added.) The court was not sure Clay "was doing that."

4. *CPO Hoyer*

The court then noted that Court Probation Officer (CPO) Kris Hoyer wanted to say something. CPO Hoyer advised the court of the probation department's definition of "no contact": "Your Honor, the conditions of probation include abiding by the probation's definition of no contact. And we have a very specific form that we have [the] defendant sign. It looks like to me this was gone over with the defendant and it was, in fact, signed by him. It has — — I'm reading eight different ways that we define contact."

CPO Hoyer read three of the probation department's definitions of contact, none of which the court believed occurred. Then CPO Hoyer read the next definition: "*There is proximity contact, being in proximity of a minor, such as in the same house, yard, park, or youth-oriented restaurant where communication could be established with a minor*. [¶] The offender should control the situation by leaving. It is not appropriate to put the responsibility on the minor to avoid communication." (Italics added.)

The court stated, "I do think he's in violation of that." Defense counsel asked, "Of what? What condition there?" The court replied, "Of not [sic] having face-to-face contact with the minor and not leaving when the minor is present." When defense counsel asked what evidence supported that conclusion, the court explained: "The evidence from both

Damien and [DPO] Rogers that they had had at least casual contact in the house." Defense counsel complained that Clay left the house after the contact was made, and the court replied: "Well, but I think in that situation he never should have gone in."

The court found Clay in violation of his probation, and the matter was continued for sentencing.

C. *Sentencing Hearing*

After considering the probation department's supplemental report, the testimony of the director of Clay's treatment program, and the arguments of counsel – all of which we address in greater detail *post* – the court executed the previously-imposed 12-year state prison sentence.

This appeal followed.

II. *DISCUSSION*

A probation revocation hearing entails two distinct questions: the "retrospective factual question whether the probationer has violated a condition of probation," and a "discretionary determination by the sentencing authority [concerning] whether violation of a condition warrants revocation of probation." (*Black v. Romano* (1985) 471 U.S. 606, 611 (*Black*).) Clay asserts error in connection with both of these questions.

As mentioned, Clay contends: (1) his due process rights were violated when the court relied on the information supplied by CPO Hoyer as to the "no-proximity" definition of "no contact"; (2) there was constitutionally insufficient notice of the "no-proximity" aspect of the no-contact probation condition; (3) there was insufficient evidence of a "no-proximity" aspect of the no-contact condition of his probation; (4) the probation condition, as defined to preclude proximity contact, was unconstitutionally overbroad; (5) the court erred in executing the prison sentence on a finding of danger to the community, because the finding was unsupported by the evidence; and (6) defense counsel provided ineffective assistance of counsel if his failure to object waived his constitutional objections. We address each contention in turn.

A. *Trial Court's Reliance on Hoyer's Statement*

Clay contends he was denied his due process right to confront adverse witnesses, based upon the trial court's receipt of information from CPO Hoyer. In particular, Clay contends that, *after* the close of evidence, Hoyer, who was never sworn as a witness or subject to cross-examination and had no apparent role in supervising Clay's probation, read to the court from a document in Clay's probation file, which listed definitions of "contact" relevant to the no-contact condition. He argues that CPO Hoyer was not a witness subject to cross-examination, and even if he could be deemed a witness, his remarks were hearsay and were improperly admitted.

1. *Right to Confront Witnesses in Probation Revocation Hearings*

There is no Sixth Amendment right to confront and cross-examine witnesses in probation revocation hearings. (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411.) A probationer does, however, have a limited due process right to confront and cross-examine adverse witnesses. (*Ibid*; *Black, supra*, 471 U.S. at p. 612; *People v. Vickers* (1972) 8 Cal.3d 451, 457 (*Vickers*).) Nonetheless, hearsay may be used in lieu of live testimony at a probation revocation hearing without a violation of due process if the court finds good cause for not allowing confrontation, such as the unavailability of the witness. (*Black, supra*, 471 U.S. at p. 612; see *People v. Arreola* (1994) 7 Cal.4th 1144, 1156-1158 (*Arreola*) [transcript of witness's testimony at preliminary hearing in lieu of live testimony from the witness was inadmissible without good cause].) Similarly, documentary hearsay may be used at a probation revocation proceeding without violation of due process if the document bears a substantial degree of trustworthiness, indicated by sufficient "indicia of reliability." (*People v. Maki* (1985) 39 Cal.3d 707, 715 (*Maki*) [car rental invoice and hotel receipt]; see *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1201 [recognizing a less stringent requirement of indicia of reliability for documentary hearsay, as opposed to testimonial hearsay]; *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1065-1067 [distinguishing between a transcript of a witness's testimony for which the court must find good cause, and documentary evidence for which admissibility requires indicia of reliability].)

The court's use of CPO Hoyer's statement regarding the probation department's definition of "contact" did not run afoul of Clay's due process right to confront and cross-examine witnesses: CPO Hoyer was not an adverse witness; the information he provided was subject to judicial notice, to which Clay did not object; and, in any event, the document CPO Hoyer read from possessed sufficient indicia of reliability.

2. *CPO Hoyer and Judicial Notice*

CPO Hoyer, in his capacity as the court's probation officer, informed the court of the document in Clay's probation file that defined the "no contact" condition. As the parties now seem to agree, CPO Hoyer was *not a witness*. He was never designated as a witness, was not called as a witness, was not sworn as a witness, and was never characterized as a witness.

Clay's right to challenge what CPO Hoyer was doing – and the substance of what he was saying – is prescribed by CPO Hoyer's function in providing the information to the court. CPO Hoyer was, in effect, the means by which the court was provided material of which the court could properly take judicial notice. Clay's potential objections, therefore, were to the process of taking judicial notice.

"Judicial notice may be taken of the following matters to the extent they are not embraced within Section 451: . . . (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (Evid. Code, § 452; see also Evid. Code, § 452, subd. (b) [regulations and enactments issued by public entity], subd. (c) [official acts of legislative, executive, and judicial departments of a state].)

The probation department's definition of "contact" was subject to judicial notice. (See *Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 753, fn. 1 [handbook of California Department of Real Estate]; *Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 1257 [police chief's memorandum].) The definition was not reasonably subject to dispute and was capable of immediate and accurate determination by simply examining the document from which CPO Hoyer was reading, or calling CPO Hoyer or another appropriate individual as a witness. (*Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309,

1318, fn. 3 [taking judicial notice of rules of the American Arbitration Association under Evid. Code, § 452, subd. (h), where such rules were readily available from the Association's regional office].)

Furthermore, to the extent the proper procedure for seeking and taking judicial notice of the probation department's definition was not followed, Clay did not object. Nor did he object more generally to the court accepting CPO Hoyer's statement regarding the probation department's definition of "contact," or the definition itself. The court did not abuse its discretion implicitly, or effectively, in taking judicial notice of the probation department's definition of "contact."[1]

A closer question is whether the court could take judicial notice of CPO Hoyer's observation, "It looks like to me this was gone over with the defendant and it was, in fact, signed by him." We note as well that, after CPO Hoyer advised the court of the form setting forth the probation department's policy, the following exchange occurred: "THE COURT: And [Clay] signed that document? [¶] MR. HOYER: Yes, Your Honor." We question whether the court could take judicial notice of the fact that Clay reviewed and signed the document (as opposed to the fact that the document bore a signature), at least based on the record before us.

Clay, however, did not object to CPO Hoyer's statement that Clay had reviewed and signed the probation department's definition of no-contact. Any objection to the court taking judicial notice of that fact was therefore waived.

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[1] Respondent contends the trial court had taken judicial notice of the probation department's file on Clay earlier in the hearing, when the prosecutor asked the court to take "judicial notice of probation conditions in SCR46199." Taking judicial notice of "probation conditions in SCR46199" pertains to items in the *court* file, not the probation department's file. The court file contained the no-contact condition and Clay's agreement to sign and abide by the probation department's definition of no contact, but it does not appear to have contained the actual form defining no contact, which was read by CPO Hoyer. In fact, it appears the prosecutor never requested the court to take judicial notice of the probation department's file or, more specifically, its definition of contact. However, a request is not required for the court to decide, in its discretion, to take judicial notice of a matter covered by Evidence Code section 452.

Furthermore, even if it had been improper for the court to take judicial notice of Clay's review and signing of the probation department's definition of contact based on CPO Hoyer's statement, any such error was harmless in light of other evidence tending to prove the same fact. It is plain from the record, and not even disputed in this appeal, that Clay was obligated, as a term and condition of his probation, to sign and abide by the Probation Department's " 'Definition of NO CONTACT.' " If he had not signed the document, that in itself would have constituted a violation of his probation, yet no such violation was ever alleged. Furthermore, Nora testified that from January to May 23, 2008, she and Damien did not sleep at 84 Bellevue because "[w]e were trying to avoid having to go out to 84 Bellevue because *it was a restriction for [Clay] that we could not live there*." (Italics added.) If Clay's mother knew, before the alleged probation violation, that Damien could not live where Clay lived, it can reasonably be inferred that Clay also knew, and he knew because he had reviewed and signed the probation department's definition of no contact, including the "proximity" definition.

The trial court did not err in taking judicial notice of the probation department's definition of contact to include proximity contact, and sufficient independent admissible evidence supported the conclusion that Clay had in fact reviewed and signed the definition. Clay fails to establish a violation of his due process right to confront and cross-examine adverse witnesses.

3. *Good Cause and Sufficient Indicia of Reliability*

Even if due process obliged us to view CPO Hoyer as akin to a testifying witness, Clay has not established reversible error. Although CPO Hoyer would have been subject to cross-examination if his statements had constituted the testimony of a witness, Clay never pursued such cross-examination, so no error can be asserted on that basis.[2]

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[2] Indeed, Clay waived or forfeited his right to raise the challenge, because he did not object to CPO Hoyer's statement or the court's reliance upon it. An objection by the defense on the grounds of hearsay or Clay's right to confront adverse witnesses would have prompted the court to hear arguments on whether judicial notice could be taken, whether CPO Hoyer should be called as a witness and be subject to cross-examination, or whether a continuance was appropriate. This is not a situation where the defense

Furthermore, because CPO Hoyer did not recite any prior testimony or out-of-court statement by any other individual, we need not consider whether there was good cause to deny confrontation of an out-of-court declarant.

Lastly, as a witness, CPO Hoyer could have testified to the content of the probation department's form defining "no contact" and the appearance that Clay had signed it – even if the document itself, though admissible, had not been offered into evidence – because there was adequate indicia of reliability. (*Maki, supra,* 39 Cal.3d at p. 715; *People v. Abrams* (2007) 158 Cal.App.4th 396, 404 [no error where probation officer testified as to content of probation department records indicating that defendant had failed to contact the probation department]; *People v. Brown* (1989) 215 Cal.App.3d 452, 454-455 [police officer's hearsay testimony concerning the results of the police chemist's test of confiscated substance could be used at probation revocation proceeding; test results were trustworthy because it was the regular business of the laboratory to conduct such tests]; see also *People v. Sword* (1994) 29 Cal.App.4th 614, 635-636 [notes of hospital staff, even if inadmissible hearsay, could be used at an outpatient status hearing; the notes were reliable because they were contemporaneous records kept by office staff in the performance of their duties].)

CPO Hoyer's description of the probation department form, including the signature it bore, was supported by numerous indications of trustworthiness. It was provided by a court probation officer, who was reading from a probation department file that he brought to Clay's probation revocation hearing, in regard to the department's specific form that was apparently signed where the probationer is supposed to sign, in a case in which it was a condition of Clay's probation that he sign the form. The form was readily available for inspection by defense counsel and the court. Indeed, the fact that

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neglected to preserve a due process objection after the trial court denied a request to cross-examine an adverse witness; it is more akin to defense counsel simply choosing not to cross-examine an individual, even though he was in the courtroom and available for cross-examination. In our view, Clay cannot now be heard to complain about the absence of a cross-examination he never sought.

defense counsel did not object to the court's reliance upon CPO Hoyer's statement further suggests there was no appearance of untrustworthiness.

Clay argues that the probation department's form did not state how and when the document was shown to Clay or how the definition was explained. Further, he argues, CPO Hoyer's lack of personal knowledge deprived Clay of examining CPO Hoyer about "the relevance, meaning, significance, and admissibility of the information [CPO Hoyer] read to the court." The trial court, however, did not prevent defense counsel from seeking to cross-examine Hoyer or from calling another witness. Clay neither objected to Hoyer's statement on these grounds nor requested to examine CPO Hoyer, call another witness, or obtain a continuance. [3]

The trial court's reliance on CPO Hoyer's statements regarding the probation department's definition of "contact" has not been shown to constitute reversible error.

B. *Constitutional Sufficiency of the Notice of Violation*

Due process requires written notice of the claimed violation of probation. (*Black, supra,* 471 U.S. at pp. 611-612; *Vickers, supra,* 8 Cal.3d at p. 457.) Clay contends the notice of his alleged violation was not constitutionally adequate, because it did not apprise him that the violation could be established merely by proof he was in the proximity of Damien, as set forth in the probation department's definition of contact.

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[3] Counsel could have done so promptly after CPO Hoyer spoke. Even after the court suggested that Clay had violated the no-proximity aspect of his no-contact condition and explained his reasoning, defense counsel did not address CPO Hoyer's statements, but instead argued: "while it wasn't a part of this hearing, [Clay] has admitted to his probation officer in written form that he's had four incidental relation – contacts with Damien where Damien was in the house, and he immediately left. So – I mean, isn't admitted to over the last year." Prosecutor Olson responded that Clay's contacts would be limited to those four only if one believed the testimony of his family members, whom Olson characterized as biased and untruthful. Defense counsel replied: "I don't want to imitate you, Ms. Olson, but –" and the court interjected: "Wait a second. I don't think I need further argument at this point. I am going to find him in violation. I will consider these factors at the time of sentencing." The court was cutting off colloquy between attorneys debating the credibility of witnesses and the number of Clay's contacts, which had already been established; there is no indication the court would have refused to consider an objection or request pertaining to CPO Hoyer's statements.

The probation department's request for summary revocation alleged that Clay was in violation because: "[Clay *had*] *contact with a minor*, his 12-year-old nephew Dami[e]n C[.], without the presence of a responsible adult and without the permission of his probation officer. During the course of investigating a house fire at [Clay's] residence on 5/22/08, fire investigators discovered indicia in the nephew's [Damien's] name and was informed by family members that the nephew had been residing at the residence with the defendant. The nephew subsequently admitted to his juvenile probation officer that he had been residing with the defendant for the past two months. Upon being questioned by the undersigned [DPO Tina Ornell], the defendant admitted that the nephew had slept at his home on four occasions, but adamantly denied that he had any contact with the nephew on those occasions." (Italics added.)

Clay acknowledges that the revocation request tracks the court's order, which it orally stated on August 12, 2005, when Clay was placed on probation – "You're not to initiate or make any contact with any minor under the age of 18 years unless the responsible adult who's been approved by probation is present and you have received prior approval of the probation officer for the contact with the minor." Clay also notes that the notice alleged as the basis for the violation that Damien "had been residing with [him] for the past two months."

Clay contends he was deprived of due process notice, because "the evidentiary portion of the hearing was over before either the parties or the court were aware of the 'proximity contact' definition which ultimately served as the basis for the violation, and [his] attorney had no opportunity to prepare and defend against that allegation." (See *People v. Mosley* (1988) 198 Cal.App.3d 1167.)

We disagree. The revocation request asserted that Clay had "contact" with a minor, obviously referring to Clay's no-contact probation condition. The request did not characterize the alleged contact as contact by association, contact by proximity, or any other particular type of contact. It therefore included all of the definitions of contact contained in the probation department's definition that governed Clay's probation condition, including proximity contact.

The notice adequately advised Clay and his attorney of the violation. Implicit in the question of whether Clay had had "contact" with Damien is the question of what definition of "contact" should be applied. Looking at the list of probation conditions itself, it is readily apparent that Clay agreed to sign and abide by the *probation department's* definition of "NO CONTACT." It follows that one would want to find out the probation department's definition, and in doing so would learn that the definitions included a prohibition against being in the "*proximity* of a minor, such as in the same house, yard, park, or youth-oriented restaurant where communication could be established with a minor," that "[t]he offender should control the situation by leaving," and that "[i]t is not appropriate to put the responsibility on the minor to avoid communication." Whether or not counsel actually made the inquiry in this case, the notice was sufficient.

Accordingly, that Clay could be found to have violated his no-contact provision by being in the same house, yard or other proximity of Damien at 84 Bellevue should not have been a surprise to anyone by the time of the revocation hearing. Indeed, it could not have been a surprise to *Clay*, in light of the evidence suggesting he knew of the probation department's definition. The fact that he did not complain of surprise or lack of notice at the hearing, even if not constituting forfeiture or waiver as a legal matter, confirms as a factual matter that Clay had sufficient notice of the violation he was found to have committed.[4]

C. *Substantial Evidence of No-Proximity Contact Condition*

Clay contends there was no substantial evidence that he was subject to a no-proximity contact order, because the information provided by CPO Hoyer, and even the

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[4] Although the notice asserted that Damien was "residing" with Clay, there is no indication that the probation department was limiting its accusation to the formal legal definition of "residence," and the notice did not limit the concept of "contact" to maintaining a residence. In fact, the notice acknowledged that Clay had admitted that Damien slept at his house on four occasions but denied that he had any "contact" with him on those occasions. The issue was whether Damien's presence at Clay's residence constituted impermissible contact under the terms of Clay's probation.

document from which he read, were inadmissible. As discussed above, the information was properly accepted by the court as a matter judicially noticed, to which no objection was made. From this information, a reasonable trier of fact could conclude that Clay's no-contact condition, which he agreed would be defined by the probation department, included a prohibition against remaining in the vicinity of a minor.

We recognize that the court took judicial notice of the probation department's definition of "no contact" *after* the close of evidence. However, no objection was made in this regard, and any such objection would have been futile in light of the court's undisputed authority to reopen the case for the purpose of receiving information regarding the probation department's definition of the no-contact condition. Indeed, that is what the court did, at least implicitly. Substantial evidence supports the finding of the no-proximity aspect of the no-contact condition.

D. *The Probation Condition Was Not Overbroad*

Clay contends the no-proximity aspect of his no-contact probation condition rendered the probation condition overbroad, because it impinged upon his constitutional right of association. We disagree.

Penal Code section 1203.1, subdivision (j), authorizes the trial court to impose any "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer." The court has " 'broad discretion to impose restrictive conditions to foster rehabilitation and to protect public safety.' [Citation.]" (*People v. Mason* (1971) 5 Cal.3d 759, 764 (*Mason*), overruled in part on other grounds *People v. Lent* (1975) 15 Cal.3d 481, 486, fn. 1.) If the probation condition is necessary to serve these purposes, it may impinge upon a probationer's constitutional rights. (*People v. Peck* (1996) 52 Cal.App.4th 351, 362.) Further, a probation condition that prohibits conduct not itself criminal is valid "if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality." (*People v. Lent*, *supra*, 15 Cal.3d at p. 486.) After all, probation is a privilege, and "[i]f the defendant considers the

conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence." (*Mason,* at p. 764.)

In the matter before us, the probation condition was not overbroad. Clay had been convicted of substantial sexual abuse upon a child under the age of 14. Keeping him away from minors in areas "such as the same house, yard, park, or youth-oriented restaurant where communication could be established with a minor," without the presence of a responsible adult and probation officer's approval, is reasonably related to the crime of which Clay was convicted and the risk of future criminality.

Clay argues that the no-proximity aspect of his probation condition "would effectively bar any contact whatsoever with minors, even contact unsought, uninitiated, incidental, and promptly terminated" and "could be violated merely by entering a house where a minor happens to be present in an upstairs room or by walking into a park where a minor is sitting behind a tree." He is incorrect. The probation condition does not preclude Clay from "any contact whatsoever with minors." To the contrary, he was permitted contact with minors where approved by his probation officer. There is no indication he ever sought such approval. Nor does the probation condition bar him from "contact unsought, uninitiated, incidental, and promptly terminated," since it only precludes him from *initiating* entry into the proximity of a minor or failing to *leave* the proximity of a minor.

Clay fails to establish that his probation condition was unconstitutionally overbroad.

E. *Execution of Sentence*

Clay contends the court erred in executing the 12-year sentence that had previously been suspended. We review a decision to revoke probation and execute sentence for an abuse of discretion. (Pen. Code, § 1203; *People v. Rodriguez* (1990) 51 Cal.3d 437, 442-445.) A trial court abuses its discretion where the factual findings find no support in the evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

We begin with a closer look at the probation department report and the testimony at the hearing.

1. *Background*

After the court found Clay in violation of his probation, the probation department submitted a supplemental report, advising that Clay was participating in sex offender treatment at Covenant Connections with the Reverend Robert Gutleben. Mr. Gutleben had informed the probation officer "that overall it appeared that the defendant had been successful in treatment," his attendance and participation were good, and he had *seemed* to be candid and open. However, Mr. Gutleben advised, in individual and group work Clay had never disclosed his contact with Damien or that Damien was living with him, until he was confronted with a newspaper article regarding the fire at his residence and Damien living there. The probation report added: "Of note, Rev. Gutleben stated that the defendant knows 'very well' that all 'incidental contacts' are to be reported at least to him. Additionally, Rev. Gutleben divulged that it was his observation of the defendant that 'he was taught very well how to avoid taking responsibility for things.' "

According to the supplemental probation report, Clay admitted that he was aware of the requirement to report to probation and his treatment provider all incidental contact with minors, but claimed he did not report his four separate instances of contact with Damien because he had convinced himself "it wasn't actual contact." Clay finally admitted to the probation officer: "I know I did something wrong by not informing Probation of the 'incidental contact' at the time it had occurred."

The probation department recommended execution of the previously-suspended 12-year sentence. The probation officer explained: "While the defendant initially assumed responsibility for the underlying offense and expressed a desire to participate in treatment, it is apparent his behavior over the past year has proved otherwise. Though it appears that the defendant was complying with the terms and conditions of probation, including sex offender treatment, it is evident that the defendant was misleading both Probation and the treatment program. The defendant has already been generously afforded an opportunity on probation and a chance to gain the necessary counseling to curb his sexual misconduct, but squandered that opportunity, based on his recent behavior involving his nephew. Given the defendant's lack of honesty and failure to take

responsibility for the violation, it is felt that the defendant is not amenable to further supervision."

At a hearing on July 21, 2008, the court and counsel discussed the supplemental probation report and the information from Mr. Gutleben. The hearing was continued so Mr. Gutleben could appear to testify.[5]

On July 25, 2008, Mr. Gutleben testified. The court questioned him about the statements in the probation report, explaining that the court had to decide whether it was safe for Clay to be in the community, but it was unsure of the reverend's opinion regarding Clay's susceptibility to treatment, whether Clay's conduct was a breach of his commitment to treatment, and how it would affect the safety of the community if he were to remain in treatment.

Mr. Gutleben testified that Clay never voluntarily disclosed the contacts he had with Damien. Only after the reverend read the newspaper article and confronted Clay did Clay begin "to open up a little." Later, when the other members of the treatment group emphasized the need to make full disclosure, Clay finally "acknowledge[] the four incidents, and nothing more." Even then, the reverend and the group were concerned that Clay had not told them the full story.

The reverend explained the seriousness of Clay's failure to report his contacts with a minor. Members of the treatment group, such as Clay, are for the most part in the community. A problem arises, the reverend asserted, if "I can't trust them to come in to tell me when things are going wrong."

Mr. Gutleben described Clay's contacts with Damien as "about as serious as it can get." He explained: "When an individual knowingly, willingly, intentionally is back in the presence of a minor, and on top of that, does not report, . . . my trust [in] them goes way, way down." The reverend further elaborated: "[Clay] having contact, not with just

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[5] Clay suggests that the court was not very concerned with Clay's contact with Damien, noting that the court stated: "I'm more concerned about him not being candid with the reverend in his sex therapy." Actually, the court was not comparing Clay's lack of candor to Clay's contact with Damien that constituted the violation of his probation, but was comparing it to the possibility that Clay had hit Damien at some point.

any minor, but a nephew, whom his probation officer, Michelle Hoff, at the very beginning of his treatment, had to lay down some very strict guidelines in order to separate [Clay] from his mother and nephew, who are all living in the same house where [Clay] was initially. [Clay] knew from the very beginning of treatment that Probation and I had been adamant that he was to have no contact with this nephew whatsoever. [¶] . . . *He knew specifically that Probation and I had a very definite stand on his being in contact with this nephew. So you know, to go ahead and be in the presence of his nephew,* . . ., I'm not quite sure what motivates a person to do that." (Italics added.)

Asked by the court if he had advised Clay of the obligation to disclose contacts with minors, Mr. Gutleben testified: "That is an ongoing theme of the entire program. It is talked about, it is understood, both in individual and group. The program as a group considers its strength, its backbone, to be honesty; to disclose issues as soon as they come up." Mr. Gutleben concluded, "So again, the real core issue is the honesty here. That's why *the failure to disclose is egregious*." (Italics added.)

After hearing the arguments of counsel, the court revoked Clay's probation and committed him to prison, explaining, "I think, after listening to the reverend today, that I may have under-estimated the seriousness of being dishonest with the program. This was a fundamental part of the program, and I think it was key to the therapeutic nature of the program: The participants would be completely honest and forthcoming. And [Clay] did not do that. At this point, I feel the safety of the community requires that I send him to state prison. He simply wasn't participating in the program in the way that the program was designed to be a beneficial therapeutic effect; and this is an execution-suspended sentence, and I'm going to impose it at this time."

2. *Substantial Evidence Supported the Court's Finding of Dangerousness*

Ample evidence supported the court's conclusion that Clay was a danger to the safety of the community. Clay was a convicted child molester with a probation condition precluding him from contact with minors. He knew that the probation department and the director of his court-ordered treatment program were adamant that he have no contact with Damien in particular. In addition, Clay knew that both the probation department and

the treatment program required self-disclosure of even an incidental contact with any minor. Nonetheless, Clay not only had such contacts with Damien on at least four separate occasions, he failed to report each and every one of them. When finally confronted with the newspaper article disclosing where Damien was living, Clay still left the impression that he was not being fully candid.

In evaluating whether to execute sentence for a violation of his no-contact probation condition, it was not unreasonable for the court to consider Clay's refusal to comply with the disclosure requirements of his treatment, and how that might relate to whether he would pose a danger to the community. It was certainly not an abuse of discretion to conclude that Clay's contacts with Damien took on serious significance in light of his insistence in hiding them from both his probation officer and his treatment provider, to the point that he posed a substantial danger to the community.

Although acknowledging the "clearly conscientious and concerned attitude with which the court approached the decision it faced," Clay argues there was insufficient evidentiary support for the court's conclusion. In particular, he urges that the court found him a danger to the community based on the Reverend Gutleben's "guesses" about the importance of Clay's failure to disclose his contact with Damien, which, he argues, bears no rational connection to the court's finding of danger to the community.

Clay's argument is meritless. The court did not find Clay a danger to the community based on the reverend's "guesses." Rather, the court based its conclusion on the reverend's undisputed factual testimony that (1) Clay failed to disclose his contacts with Damien, and (2) the disclosure requirement was important to the treatment program, as an "ongoing theme of the entire program" that was "talked about and . . . understood." The reverend emphasized that honesty and prompt disclosure of even incidental contacts comprised the very backbone of the treatment program. Moreover, Clay ultimately *admitted* to the probation officer that he did wrong by not disclosing his contacts with Damien when they occurred. Contrary to Clay's assertion, there is unquestionably a rational relationship between a convicted child molester refusing to disclose his

prohibited contacts with minors while in the community, and his being a danger to the community.

The reverend's testimony about a "guess" pertained to the difficulty he had in predicting whether Clay would endanger the community. Mr. Gutleben testified: "I think that probably anything that I would offer, positive or negative, at this point would be my guess. And I'm not really sure I'm in a position to make a guess like that." He subsequently added: "the future [for Clay] is, at best, pretty fuzzy . . . *There's no way to know, and his history is not good*." (Italics added.) In light of these observations, the reverend's inability to say whether or not Clay would endanger the community did nothing to assuage the court's reasonable concern over Clay's failure to report his contacts with Damien. At any rate, the reverend's hesitance to opine on Clay's risk to the community did not preclude the court from drawing its own inference from the facts to which the reverend had testified.

Clay's other arguments are meritless as well. He argues there was no basis for the reverend's assumption that Clay's contacts with Damien were perpetrated "knowingly, willingly, and intelligently." However, whether the reverend had a basis for that characterization or not, the point is that Clay never voluntarily *disclosed* those contacts with Damien, despite the treatment program's requirement that he do so, on at least four separate occasions. It was this lack of candor and disregard for the rules of his treatment program that rightfully suggested to the court Clay's danger to the community.

Clay argues that Mr. Gutleben's testimony was the "speculation [of] a lay person expressing personal emotional involvement" in feeling duped by Clay's failure to disclose his forbidden contacts with Damien. We disagree. As director of the treatment program, Mr. Gutleben had personal knowledge of the program rules and Clay's refusal to abide by them. The reverend was not offering a subjective opinion swayed by a personal reaction to what Clay had done, but was simply reporting objective facts. Indeed, his hesitance to opine on the extent to which Clay's secrecy posed a danger to the community reflects the objectivity and reserve with which the reverend made his report.

Clay further points out that the court file contained a report from a Dr. Kastl, who, Clay contends, found that Clay "did not fit the diagnostic criteria for pedophilia." Actually, Dr. Kastl found that Clay *did* fit the diagnostic criteria for pedophilia, but believed the diagnostic criteria should not be followed, that Clay actually suffered from avoidant personality disorder, and that he could benefit from treatment. However, Dr. Kastl's report was prepared in *2005*, years before it came to light that Clay was refusing to abide by the rules of his treatment program and was hiding his contacts with his minor nephew.

Lastly, we take issue with Clay's characterization of the court's exercise of its discretion. Clay asserts: "Were the court's exercise of discretion here to be upheld, it would mean that appellant was sentenced to twelve years in prison, a month before his grant of probation was to expire, for violating an impossibly broad associational ban which was not imposed by the court and would not have passed constitutional muster if it had been, and for failing to volunteer such association to his program, even though it was never a condition of probation that he do so." Clay is wrong on every point. He was not sentenced to 12 years in prison for associating with minors or failing to disclose such disclosure: he was sentenced to 12 years for substantial sexual conduct with his four-year-old niece, a charge to which he pled guilty. It was the *execution* of sentence that was triggered by his associating with a minor and failing to disclose that to his treatment program (and his probation officer), but the "associational ban" was not "impossibly broad," it *was* imposed by the court as a condition of his probation (through the no-contact condition and condition that he abide by the probation department's definition of no-contact), and the condition *did* pass "constitutional muster," for reasons already explained. Moreover, this is not a situation in which Clay complied with the terms of his probation for years and, just before his probation was to expire, stumbled into one technical violation of a probation condition. To the contrary, on four different occasions during the probationary period, Clay not only had contact with his minor nephew, he refused to abide by the terms of his court-ordered treatment program; it was not that he

made a mistake shortly before his probation expired, but that he was *caught* shortly before it expired.

In the end, the issue is not whether this court would have decided to order execution of Clay's sentence, but whether the appellant has shown that the trial court's decision to order execution of sentence exceeded its broad discretion. Clay fails to demonstrate an abuse of discretion.

F. *Effective Assistance of Counsel*

Clay asserts that he was provided ineffective assistance of counsel if we find that his claims on appeal were forfeited by his defense counsel's failure to object.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient because his representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) prejudice flowing from counsel's performance or lack thereof. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) We reverse convictions on the ground of inadequate counsel only if "the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581-582.)

Clay argues that his attorney should have objected to the court's reliance on CPO Hoyer's statements. However, there appears in the record a sound tactical reason for defense counsel not to object. Defense counsel reasonably could have suspected that, if she objected, the prosecution's case could be reopened and a probation officer could be called as a witness to introduce the subject document into evidence anyway. There would be no sense in attempting to prove, by cross-examination or otherwise, that Clay had not signed the document, since that would only establish that Clay had violated his probation on *that* ground. In any event, the record discloses no prejudice from counsel's decision not to object, since there is no indication that the document would not have been received into evidence over the objection.

Clay also argues that defense counsel should have asserted that Clay received constitutionally inadequate notice and the probation condition was unconstitutionally

overbroad. We found these arguments to be without merit, however, so no prejudice arose from counsel's failure to object on these grounds. Furthermore, because we do not dispose of any of Clay's arguments on appeal based solely on waiver or forfeiture, Clay lost no right of review by his counsel's failure to object.

Clay fails to establish ineffective assistance of counsel.

III. *DISPOSITION*

The order is affirmed.

NEEDHAM, J.

We concur.

JONES, P. J.

BRUINIERS, J.